82-1155

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

OTASCO, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When federal judicial proceedings are instituted against a person and his property, can his right to appear in court to defend his property rights be conditioned upon the payment of a fee?

PARTIES

The petitioner is Otasco, Inc. (formerly Oklahoma Tire and Supply, Inc.), an Oklahoma corporation engaged in the selling of a variety of merchandise to the public through a chain of retail stores located throughout Oklahoma and the southern part of the United States.

The respondent is the United States government. The United States government acting through the judicial conference established a fee in bankruptcy court which is imposed upon secured creditors against whom bankruptcy proceedings have been instituted and who desire to take any action with regard to the secured property that is in the debtor's possession.

The United States government was permitted to intervene in the bankruptcy court in two bankruptcy proceedings where Otasco, Inc. was a secured creditor and the debtors were Ronald G. South (BK-80-00317) and Terry Lynn Klingman (BK-80-00507). Both cases have been filed and litigated in the United States District Court for the Western District of Oklahoma. Neither South nor Klingman has appeared, and neither has any interest in these proceedings.

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No. .....

In the
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OCTOBER TERM, 1982

OTASCO, INC.,
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v.
THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, OTASCO, INC., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 14, 1982.

OPINIONS AND ORDERS BELOW

This is a Petition for Certiorari directed to the United States Court of Appeals for the Tenth Circuit and specifically at its opinion written in this case reversing rulings by Judge Luther Eubanks, Chief Judge of the United States District Court for the Western District of Oklahoma and Judge David Kline, Bankruptcy Judge of that court. The Court of Appeals opinion appears at pages 1a through 8a of the Appendix hereto. The opinion of Judge Eubanks

appears at pages 1c through 7c of the Appendix. The opinion of Judge Kline appears at pages 1d through 17d of the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit, which is the subject of this petition, was entered on September 14, 1982. A petition for rehearing was timely filed on September 28, 1982. On October 12, 1982, the United States Court of Appeals for the Tenth Circuit entered its order overruling the petition for rehearing (Appendix, pg. 9a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title II of the Bankruptcy Reform Act of 1979 amended 28 U.S.C. §1930 to read in part:

> "(a) Notwithstanding section 1915 of this title, *the parties commencing a case under title 11* shall pay to the clerk of the bankruptcy court the following filing fees:
>
> (1) For a case commenced under chapter 7 or 13 of title 11, $60.[5]
>
> (b) *The Judicial Conference* of the United States *may prescribe additional fees* in cases under title 11 *of the same kind* as the Judicial Conference prescribes under section 1914(b) of this title.
>
> (e) The clerk of the bankruptcy court may collect only the fees prescribed under this section." (emphasis added)

Effective October 1, 1978, 28 U.S.C. §1914 was amended, increasing the district court $15.00 filing fee requirement as follows:

> "(a) The clerk of each district court shall require the *parties instituting any civil action, suit* or *proceeding* in such court, whether by *original process, removal* or *otherwise, to pay a filing fee of $60,* except that on application for a writ of habeas corpus the filing fee shall be $5.
>
> (b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States. . . ." (emphasis added)

Other relevant statutes dealing with the rights of secured creditors under the Bankruptcy Act are cited and quoted in pertinent part, *infra.*

STATEMENT OF THE CASE

Chronologically, the events leading to this appeal may be divided into two categories: those occurring before the Debtors' bankruptcy cases were filed, and those which occurred thereafter.

1. PRE-BANKRUPTCY EVENTS

Otasco sells a variety of merchandise to the public through a chain of retail stores, and as a creditor is involved in some 800 to 1000 bankruptcy cases annually. The amounts of indebtedness, usually secured, average about $300.00.[1]

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[1] Comparison of Bankruptcy Account Charge Offs (See Appendix G).

During 1979 and 1980, Otasco sold goods to the Debtors.[2] The sales by Otasco to the Debtors were on credit, with the Debtors agreeing to pay Otasco the purchase prices in installments, and with the Debtors agreeing that the goods purchased would, as collateral, secure their purchase money indebtedness to Otasco.[3]

The Debtors each defaulted under their agreements with Otasco by failing to pay installments of their purchase money debts as agreed. Under the express terms of the Debtors' respective agreements with Otasco, and under applicable law, upon the Debtors' breach of the security agreement, Otasco had the following two basic rights:

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[2] Goods sold to Ronald Gene South included one .38 caliber special pistol and shells, for $95.10, and two tires, for $161.34. *See* Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30). Terry Lynn Klingman purchased an air conditioner for $464.88, and four tires for $348.38. *See* Complaint and Objection to Discharge (Record Vol. II, pg. 143).

[3] *See* Exhibits to Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30) and to Complaint and Objection to Discharge (Record Vol. II, pg. 143). Under the Bankruptcy Code, the Debtors created a "security interest", *i.e.*, a "lien created by agreement" in favor of Otasco with respect to the goods sold. 11 U.S.C. §101(37); *See also* 12A Okla. Stat. 1971, §1-201(37), which defines, in pertinent part, the term "security interest" to mean "an interest in personal property . . . which secures payment or performance of an obligation." The Bankruptcy Code further defines the term "lien" to be a "charge against or interest in property to secure payment of a debt or performance of an obligation . . ." 11 U.S.C. §101(28). Also of significance definitionally, the term "collateral" means "the property subject to a security interest . . ." 12A Okla. Stat. 1971, §9-105(1)(c). As is apparent by these definitions, Otasco retained a property interest in the goods sold to assure payment of the Debtors' respective obligations to pay the purchase prices therefor.

a. First, immediately to be paid in full *all* monies owed by the Debtors;[4] and,

b. Second, immediately to take possession of its collateral.[5]

Before the Debtors commenced their voluntary bankruptcy cases, Otasco had filed suits in the District Court of Oklahoma County seeking enforcement of these rights.[6]

But for the intervention of the Debtors' voluntary bankruptcy cases, the rights of Otasco to immediate payment from the Debtors and to immediate possession of its

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[4] By statute, when a debtor defaults under an agreement which creates a security interest (a "security agreement") 12A Okla. Stat. 1971, §9-105 (1)(h), the secured party (the person in whose favor the security interest exists, Otasco in this case (12A Okla. Stat. 9-105(1)(i)), "has the rights and remedies provided in [Part 5 of Article 9 of the Uniform Commercial Code, 12A Okla. Stat. 1971, §9-501, *et seq.*] and, except with respect to limitations not here applicable, those provided in the security agreement." 12A Okla. Stat. 9-501(1). Among the rights provided in the agreements between the Debtors and Otasco was Otasco's right to be paid immediately and in full all monies owed by the Debtors upon their default. *See* Exhibits to Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30) and to Complaint and Objection to Discharge (Record Vol. II, pg. 143).

[5] Upon default by the Debtors, Otasco's right to immediate possession of its collateral arose by agreement (*See* Exhibits to Complaint and Objection to Dischargeability of Indebtedness, *id.*, and to Complaint and Objection to Discharge, *id.*), as well as a matter of express statutory right. 12 Okla. Stat. 1971, §9-503.

[6] Kline Opinion at page 5d of Appendix. *See* Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30), and Complaint and Objection to Discharge (Record Vol. II, pg. 143).

collateral would have been enforced, and Otasco's interests protected, in the State Court cases.[7]

2. POST-BANKRUPTCY EVENTS

The Debtors each filed voluntary petitions[8] with the Bankruptcy Court seeking relief under chapter 7 of the Bankruptcy Code.[9] Both Debtors retained possession and continued to use Otasco's collateral.[10] Because of the type of goods comprising Otasco's collateral, *i.e.*, tires, an air

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[7] In the cases filed in State Court, Otasco sought, in addition to money judgment against the Debtors, *immediate* possession of its collateral pursuant to Oklahoma's replevin statutes (12 Okla. Stat. 1971, §1571, *et seq.*, as amended). Under 12 Okla. Stat. Supp. 1980, §1571A.3, Otasco was entitled to possession of its collateral *pre-judgment*, after posting an appropriate bond, possibly as soon as five days after service of process upon the Debtors.

[8] Voluntary Case Debtor's Petition (Record Vol. I, pg. 1); Voluntary Petition (Record Vol. II, pg. 114).

[9] 11 U.S.C. §701, *et seq.*, entitled "Liquidation".

[10] On the Schedules accompanying the voluntary bankruptcy petitions, the Debtors listed certain items of Otasco's collateral as "exempt" property. Voluntary Case Debtor's Petition, Schedule B-4 (Record Vol. I, pg. 11); Voluntary Petition, Schedule B-4 (Record Vol. II, pg. 125). (Apparently, certain items of Otasco's collateral may have been disposed of by the Debtors prior to bankruptcy. Otasco was, however, stayed from even telephoning the Debtors to inquire as to such collateral's whereabouts. *See* text at 13 *infra.*) If no objection is filed to the debtor's claim of exempt property, the property is excluded from administration in the bankruptcy case as "property of the *estate*". 11 U.S.C. §522. It is thereafter classified as "property of the *debtor*". Since the duties of the trustee are directed only toward property of the estate, the debtor never relinquishes possession nor control over the property. Consequently, the property does not become subject to the duties of the trustee to preserve, account for and liquidate. 11 U.S.C. §704.

conditioner, etc.,[11] which through use, model changes and the like, rapidly depreciate in value, the Debtors' retention of possession and continued use was necessarily a critical concern to Otasco.

Following the filing of the Debtors' voluntary petitions, the Bankruptcy Court entered orders and issued notices in each of the Debtor's cases substantially affecting Otasco's rights described above which had accrued upon the Debtors' defaults.[12]

The Discharge Orders and Stay Notices specifically altered the above-described rights of Otasco which arose upon the Debtors' defaults. First, with respect to Otasco's right to payment, the Discharge Orders and Stay Notices provided:

> "If no objection to the discharge of the debtor is filed on or before the last day fixed therefor [usually 30 days after the first date set for the first meeting of creditors, as provided by Rule 404, Rules of Bankruptcy Procedure], the debtor will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4) or (6) of 11

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11 *See* note 12, *supra.*

12 Order for Meeting of Creditors and Fixing Times for Filing Objections to Discharge and for Filing Complaints to Determine Dischargeability of Certain Debts, Combined with Notice Thereof and of Automatic Stay (South case — Record Vol. I, pgs. 12, 13; Klingman case — Record Vol. II, pgs. 124, 125). Such orders and notice (collectively "the Discharge Orders and Stay Notices") were in the form given in all bankruptcy cases by the Bankruptcy Court, designated Official Form No. 13, in accordance with the Bankruptcy Court's Local Rule 1 adopting the Suggested Interim Rules of Bankruptcy Procedure. Copies of the Discharge Orders and Stay Notices (Attachments "3" and "4") are attached hereto as Appendix E and Appendix F, respectively.

> U.S.C. §523(a) is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged."[13]

Second, with respect to Otasco's right to immediate possession of its collateral, the Discharge Orders and Stay Notices stated:

> "As a result of the filing of the petition, certain acts and proceedings against the debtor and the property of the debtor are stayed as provided in 11 U.S.C. §362(a)."[14]

The impact of the quoted provisions of the Discharge Orders and Stay Notices, as imposed upon the rights of Otasco, may best be analyzed in terms of the "discharge", and then the "automatic stay".

a. Discharge: 11 U.S.C. §§523(a), 524, 727(a)

The effect of a bankruptcy discharge of a creditor's claim is defined in Section 524 of the Bankruptcy Code (11 U.S.C. §524), which provides in pertinent part as follows:

> "(a) a discharge [in a bankruptcy case] —
>
> * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment

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[13] *Id.* Under Rule 404, Rules of Bankruptcy Procedure, as amended by suggested Interim Bankruptcy Rule 4002, the bankruptcy court sets a deadline for filing complaints *objecting* to the debtor's discharge. Under Rule 409, Rules of Bankruptcy Procedure, as amended by suggested Interim Bankruptcy Rule 4003, the bankruptcy court also sets a deadline for filing complaints contending that a particular debt is *excepted* from discharge.

[14] *Id.*

> of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not a discharge of such debt is waived; and
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect or recover from, or offset against, property of the debtor. . . ."

The legislative history amplifies Congress's intent:

> "The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a *total prohibition on debt collection efforts.*
>
> * * *
>
> In effect, the discharge *extinguishes the debt.* . . ." House Report No. 95-595, 95th Cong., 1st Sess. 365-6 (1977); Senate Report No. 95-989, 95th Cong., 2nd Sess. 80 (1978). (emphasis added)

A discharge, thus, *permanently enjoins* the commencement or continuation of an action, the employment of process, or the taking of *any act whatsoever,* to collect any debt as a personal liability of the debtor. Unless a creditor takes action to prevent it, the entire debt will be discharged as a personal obligation of the debtor.

There are two ways a creditor may challenge the debtor's discharge. In both, the prescribed procedure is by "adversary proceeding" in the bankruptcy court, commenced by filing a "complaint."[15] First, the creditor may

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[15] Rule 701, Rules of Bankruptcy Procedure, identifies as an adversary proceeding "any proceeding instituted by a party before a bankruptcy judge to . . . (4) object to . . . a discharge . . . (6) obtain relief from

file a complaint *objecting* to the debtor's discharge *in toto*.[16] Second, the creditor may file a complaint seeking to *except* that creditor's claim from the debtor's discharge.[17]

b. The Automatic Stay: 11 U.S.C. §362

When a bankruptcy petition is filed, the right of a secured creditor to proceed against the defaulting debtor or against property of the debtor is automatically stayed. 11 U.S.C. §362. In pertinent part, 11 U.S.C. §362(a) provides:

> "[The filing of a bankruptcy petition] operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, ad-

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[15] (Continued)

a stay . . . or (7) determine the dischargeability of a debt." Rule 703, Rules of Bankruptcy Procedure, provides that "an adversary proceeding is commenced by filing a complaint with the court." Such Rules are applicable to the present cases in accordance with Section 405(d), Bankruptcy Reform Act of 1978, Pub. L. 95-598.

[16] U.S.C. §727(a) provides grounds upon which a bankruptcy court may deny a discharge *in toto*. Subsection 727(c)(1) permits a creditor to object to discharge on a subsection (a) ground. The Discharge Orders and Stay Notices fixed a time limitation on Otasco's right to file such objection in accordance with Rule 404(a), Rules of Bankruptcy Procedure (applicable to the present cases in accordance with Section 405(d), Bankruptcy Reform Act of 1978, Pub. L. 95-598).

[17] In contrast to the objection to discharge *in toto*, note 26, *supra*, 11 U.S.C. §523(a) provides grounds upon which an individual creditor may have its debt excepted from the debtor's discharge. Subsection 523(c) requires creditors to request, by complaint, note 25, *supra*, that their individual debt be excepted from the debtor's discharge. The Discharge Orders and Stay Notices fixed a time limitation on creditors such as Otasco

> ministrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim against the debtor that arose before the commencement of the [bankruptcy case];
>
> * * *
>
> (5) any act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the [bankruptcy case];
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy case] . . ."

The "any act" language of Section 362(a)(6) precluded Otasco from even telephoning the Debtors to ascertain the whereabouts, condition, etc., of its collateral, unless and until Otasco sought relief in the Bankruptcy Court and the Bankruptcy Court terminated, annulled or modified the automatic stay order.

The prescribed procedure for seeking relief from the automatic stay is by adversary proceeding in the bankruptcy court commenced by filing a complaint.[18] The automatic stay restricts all remedies, legal and equitable, exclusively to the jurisdiction of the bankruptcy court. There is no other forum. The filing by the Debtors of voluntary

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[17] (Continued)

within which they could file complaints of this type, in accordance with Rule 404(a), Rules of Bankruptcy Procedure (applicable to the present cases in accordance with Section 405(d) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598).

[18] Rules 701 and 703, Rules of Bankruptcy Procedure, *see* note 25, *supra.*

petitions in the Bankruptcy Court stayed Otasco's cases filed in State Court, and precluded Otasco from exercising either its immediate right to payment or to possession of its collateral.

Thus, to avoid the discharge of the Debtors' purchase money debts, the Discharge Orders and Stay Notices *required* Otasco to file complaints in the Bankruptcy Court. Likewise, if possession of its collateral was to be obtained, the Discharge Orders and Stay Notices *required* Otasco to file complaints in the Bankruptcy Court. The requirement that Otasco take action in the Bankruptcy Court to either be paid (avoid discharge) or to obtain possession of its collateral (relief from the stay) is in accord with the broad, *exclusive* jurisdictional grant to the Bankruptcy Court in respect of matters pertaining to the Debtors and their property.[19]

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[19] 28 U.S.C. §1471 (applicable to the present cases in accordance with Section 405(c)(2) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598), entitled "Jurisdiction", provides in pertinent part:

> "(a) [The bankruptcy courts] shall have *original and exclusive* jurisdiction of all [bankruptcy cases].
>
> (b) [The bankruptcy courts] shall have original but not exclusive jurisdiction of all civil proceedings arising under [bankruptcy cases] or arising in or relating to [bankruptcy cases].
>
> • • • •
>
> (e) The bankruptcy court in which a [bankruptcy case] is commenced shall have *exclusive jurisdiction* of all of the property, wherever located, of the debtor, as of the commencement of such case." (emphasis added)

Thus, a bankruptcy petition grants the bankruptcy courts essentially exclusive jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases. Otasco was forced into the bankruptcy forum by the Debtors. Otasco did not voluntarily seek access to the Bankruptcy Court, yet was required to recognize its exclusive jurisdiction.

Faced with the certain loss of both its right to immediate payment in full, and its right to immediate possession of its collateral, Otasco pursued its only course of action in the only available forum. Otasco filed complaints in the Bankruptcy Court seeking non-dischargeability determinations and relief from the stay.[20] As a prerequisite to the filing of such complaints, the clerk of the Bankruptcy Court was required to charge Otasco a $60.00 filing fee with respect to each complaint.[21]

REASONS FOR GRANTING THE WRIT

There are a number of reasons why this Court should grant the requested writ. They are as follows:

1. This is a case of enormous commercial significance. Secured creditors all across the country are being forced to pay the fee in question in literally thousands of cases each year in order to defend their property rights guaranteed by law. As an example of the negative economic impact suffered by retail merchants such as Otasco, a comparison of bankruptcy account charge-offs appears in the Appendix at pages 1g through 3g. This chart reflects the numbers of bankruptcies in which Otasco has been involved and in

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[20] Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30); Complaint and Objection to Discharge (Record Vol. II, pg. 143).

[21] In accordance with objections raised by Otasco to the filing and pursuant to its Application by Plaintiff to Place Filing Fee in Escrow filed in each case (Record Vol. II, pg. 147; Record, Vol. II, pg. 182), filing fees of Otasco were placed with the Court Clerk "in escrow" pending a determination of this appeal.

which they would have to pay the subject bankruptcy fee if they are to protect their property.

2. While petitioners have not discovered any other decision by a United States Court of Appeals dealing with this precise question, there are a number of United States District Court decisions and bankruptcy court decisions which are in conflict. In its reply brief in the court below, the government cited a number of decisions dealing with this question such as *Purdy* v. *United States*, 10 B.R. 901 (N.D.Ga. 1981), *aff'd* No. C81-129 R (N.D.Ga. 1981), *In re Bradford*, 8 B.C.D. (CRR) 263 (E.D.Ill. 1981) and *In re Leyba*, 7 B.C.D. (CRR) 1111 (Colo. 1981). Further, as stated by the government in its original brief in the circuit court:

> "[2] About 25 cases have been filed challenging the $60.00 filing fee. Decisions in many of the cases have been stayed pending the outcome of this appeal. At least two of these cases have been brought in the Tenth Circuit. In *Fidelity Financial Services, Inc.* v. *Sophia Leyba*, No. 81 M 1080 (July 15, 1981), the Bankruptcy Court for the District of Colorado expressly rejected the reasoning of the bankruptcy and district courts in this case and upheld the $60 fee. No appeal was taken by the creditor. In *In re Wright*, B.R. No. 81-0092 P, Adv. Pro. No. 81-0196 (July 27, 1981), the Bankruptcy Court for the District of New Mexico invalidated the fee, relying largely on the analysis in this case. The government has appealed the decision to the district court and moved to stay those proceedings pending the outcome of this appeal."

3. Conditioning the right to defend one's property rights upon the payment of a fee is constitutionally im-

permissible under established concepts of due process of law and is inconsistent with decisions of this Court.

Under the provisions of the Fifth Amendment to the Constitution of the United States no one may be "deprived of life, liberty or property without due process of law." The very essence of due process of law is free access to the courts to defend these rights. No fee may be charged as a condition precedent to the right of a person to defend his life, liberty or property.

No one would seriously contend that a defendant in a criminal case, be he rich or poor, could be required to pay a fee before appearing in court to answer the allegations against him. Under our laws property rights must be similarly protected. The government may not impose a fee or tax as a prerequisite to the right to defend. [*See Burns* v. *Ohio*, 360 U.S. 252 (1959) and *Smith* v. *Bennett*, 365 U.S. 708 (1961), holding the imposition of a fee as a precondition for filing of appeals or habeas corpus proceedings where personal liberty is involved, a violation of due process of law.]

This novel question now before the Court has never been directly addressed by this Court. However, in two relatively recent decisions by this Court, *dicta* appearing in the majority, concurring, and dissenting opinions, strongly indicate that the right to defend cannot be conditioned upon the payment of a fee.

The first case is *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). In this case the United States Supreme Court held that a state court filing fee required of indigent persons seeking a divorce was violative of due process of law.

The Court, commenting on the judicially established requirement that persons forced to defend themselves or their property in court must be given a meaningful opportunity to be heard, stated:

> "Early in our jurisprudence, this Court voiced the doctrine that *'(w)herever one is assailed in his person or his property, there he may defend,'* * * * citations of authority * * *. The theme that 'due process of law signifies a right to be heard in one's defence,' *Hovey* v. *Elliott,* supra, at 417, 42 L Ed at 221, has continually recurred in the years since *Baldwin, Windsor,* and *Hovey.* Although '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S Ct 652 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" 401 U.S. at 377-78, 28 L.Ed.2d at 118. (emphasis added)

The question for determination in *Boddie, supra,* was whether indigent persons would have access to the court system as plaintiffs. But in discussing the indigency aspect of the case and clearly negating its importance, the majority opinion reflected the Court's concern about a defendant's right to defend his person or property regardless of ability to pay. The Court stated:

> "But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For *at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a de-*

> *fendant's full access to that process raises grave problems for its legitimacy.*" 401 U.S. at 376, 28 L.Ed.2d at 117. (emphasis added)

As previously demonstrated herein, the filing of complaints in the Bankruptcy Court was the only effective means for Otasco to obtain relief — the Bankruptcy Court had exclusive jurisdiction as to both the discharge and stay of Otasco's rights;[22] and, Otasco had no effective alternative to filing its complaint.[23]

Shortly after the *Boddie* decision, *supra*, the United States Supreme Court decided the case of *United States* v. *Kras*, 409 U.S. 434 (1973). That case dealt with the question of whether an indigent person could be required to pay a fee before he could avail himself of the federal bankruptcy law. The Court held that the case was distinguishable from *Boddie, supra*, because bankruptcy is not the only available relief for debtors and there is no constitutional right to obtain a discharge of one's debts in bankruptcy.

Stated differently, *Boddie* held that denying an indigent access to the divorce courts because of a filing fee requirement was constitutionally unsupportable, divorce in state court being the sole and exclusive method of disolving a marriage relationship. On the other hand, the Court in *Kras, supra*, held that there were other means by which a party could rearrange his financial burdens without resort to the bankruptcy courts and that, therefore, charging a fee before one could have access to bankruptcy was not constitutionally prohibited.

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22 *See* text at 10-16, *supra*.

23 *See* Proposition III, text at 29-41, *infra*.

It is critical to note that in the case at bar we are not dealing with the question of whether access to the bankruptcy courts is available in the first instance. Rather, we are concerned with the constitutional propriety of imposing a fee as a precondition to the right to defend one's property interests in the sole and exclusive forum in which he may do so. Once the provisions of the bankruptcy law have been invoked, bankruptcy court becomes the sole and exclusive forum in which the claims to the debtor's property can be asserted and in which creditors can protect their security interests. 28 U.S.C. §1471(e) and 11 U.S.C. §362.

It is this element of exclusivity which is the primary distinction between *Boddie* and *Kras*. Exclusivity is present in the case at bar because the bankruptcy court has become the exclusive forum in which Otasco may protect its property interests. This distinction is clearly indicated in the majority opinion in *Kras*. The Court, referring to *Boddie, supra,* states:

> "In the light of all this, we concluded that resort to the judicial process was '*no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court*' and we resolved the case 'in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.'" 409 U.S. at 444, 34 L.Ed.2d at 635. (emphasis added)

The quoted language is equally applicable to the case at bar.

Here Otasco is called upon to defend its interests in court and is entitled to do so without the payment of fees.[24] A study of the federal fee system reveals that this is the *only instance* under federal law where a fee must be paid by a person against whom proceedings have been instituted.

In the court below, the government suggested that the bankruptcy system should be paid for by those who use it. Otasco has no quarrel with that statement. Here Otasco did not voluntarily file a petition in bankruptcy. As pointed out by Judge Kline:

> "It is constitutionally suspect to urge that the bankruptcy system should be paid for by those *against whom it is used.*" Kline Opinion at 11. (emphasis added)

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[24] Otasco does not challenge the $60 filing fee for all adversary complaints in the bankruptcy court. Under the new Bankruptcy Reform Act of 1978 (Pub. L. 95-598), the expanded jurisdiction of the bankruptcy court allows it to hear many civil proceedings which might otherwise be heard in district court. Otasco objects *only* to the filing fee for three specific types of complaint: (1) to obtain relief from the automatic stay; (2) to determine dischargeability of particular debts; and (3) to generally object to discharge. No objection is made by Otasco to the other types of complaints which, under the Bankruptcy Reform Act of 1978, may now be filed in a bankruptcy court in accordance with Rule 7001, Interim Rules of Bankruptcy Procedures, which now includes within the definition of "adversary proceeding" any "proceeding before a bankruptcy judge for legal, equitable, or declaratory relief which arises under non-bankruptcy law." Otasco's objection is limited to the three *bankruptcy law* types of adversary proceedings listed above. The opinions of the Bankruptcy Court and the District Court are likewise limited. Kline Opinion at 13; Eubanks Opinion at 1-2.

CONCLUSION

For the foregoing reasons, petitioner, Otasco, Inc., respectfully submits that this Court should grant this Petition for Writ of Certiorari.

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